ASIA CONTROL SYSTEMS IMPAC (M) SDN BHD A

v.

PNE PCB BHD & ANOTHER APPEALS

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
HISHAMUDIN MOHD YUNUS JCA
AZHAR MA'AH JCA
[CIVIL APPEAL NOS: W-02-1990-2009 & W-02-1982-2009]
7 JUNE 2010 C

ARBITRATION: *Award - Setting aside - Application for - Jurisdiction - Arbitration Act 1952, s. 34(1) - Whether expresses clear intention of parliament not to give jurisdiction to the court - Whether intention of parties to expressly exclude dispute from jurisdiction of High Court* D

ARBITRATION: *Award - Enforcement - Jurisdiction - Granting leave to enforce arbitrator's award - Whether High Court of competent jurisdiction to effect enforcement - Arbitration Act 1952, ss. 34(1), (2), (3)* E

These were two appeals by Asia Control Systems IMPAC (M) Sdn Bhd ('the appellant') against two decisions of the High Court, as follows (i) dismissal of the appellant's originating motion which sought to set aside the arbitrator's award and (ii) allowing the respondent's (PNE PCB Berhad's) originating summons and F granting leave to enforce the arbitrator's award. The facts were that the arbitrator had handed down his award against the appellant. The award was made pursuant to the (United Nations Commission on International Trade Law) UNCITRAL Arbitration Rules and the Rules of the Kuala Lumpur Regional Centre for Arbitration G ('KLRCA'). The issues that arose herein were (i) whether the High Court had erred in holding that s. 34(1) of the Arbitration Act 1952 took the arbitration out of the jurisdiction of the court and (ii) whether upon the true construction of s. 27 and s. 34 of the Arbitration Act 1952, the High Court was correct in granting leave H to the respondent herein to enforce the award.

Held (dismissing both appeals)
Per Low Hop Bing JCA delivering the judgment of the court:

I

(1) Section 34(1) expresses the clear intention of Parliament not to give jurisdiction to the court as the 'parties have proceeded to arbitration knowing full well the limitation of the court set

out in s. 34(1).' There was no express or implied term in the contract entered into by the parties herein which was capable of being construed as giving rise to any recourse to the court. The parties had freely and voluntarily entered into the contract and they have expressly and carefully chosen to exclude court intervention. They have elected to abide by the UNCITRAL Arbitration Rules and the Rules of the KLRCA. That election by them must be viewed in the light of the consequences flowing from s. 34(1). (paras 10, 11, 13, 15 & 16)

(1a) An analysis of the relevant judgments made it crystal clear that apart from the 'emergency situation' or a state of urgency in *Thye Hin Enterprises Sdn Bhd*, the preponderance of authorities revealed a consistent pattern under s. 34(1) *ie*, the Act or other written law shall not apply to any arbitration held under, as in the instant appeal, the UNCITRAL Arbitration Rules and the Rules of the KLRCA. This exclusionary principle was predominant and prevailed, particularly where s. 34(1) begins with the words "Notwithstanding anything contrary in this Act or any other written law." The parties herein have consciously and decisively agreed and chosen the special alternative dispute resolution *ie*, arbitration under the UNCITRAL Arbitration Rules and the Rules of the KLRCA. This freedom of choice was clear and unambiguous. The intention of the parties was to expressly exclude the dispute from the jurisdiction of the High Court. (para 18)

(2) Section 27 expressly provides for the discretion of the High Court to grant leave for the enforcement generally of an arbitral award handed down under the Arbitration Act 1952, and not pursuant to the UNCITRAL Arbitration Rules and the Rules of the KLRCA. In the instant appeal, the enforcement of an arbitral award made pursuant to the UNCITRAL Arbitration Rules and the Rules of the KLRCA is more specifically governed by the combined effect of s. 34(1), (2) and (3). The enforcement of such an award was indeed an exception to the general exclusionary principle which dispensed with the application of the provisions of the Act or other written law to an arbitration held under the UNCITRAL Arbitration Rules and the Rules of the KLRCA. Section 34(1) read with s. 34(2) permits the enforcement under s. 34(2) in Malaysia of an arbitral award made under

s. 34(1). Pursuant to s. 34(3), the court of competent jurisdiction to effect the enforcement is the High Court. (para 24)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah dua rayuan, oleh Asia Control Systems IMPAC (M) Sdn Bhd ('perayu') terhadap dua keputusan Mahkamah Tinggi, iaitu (i) menolak saman pemula perayu yang memohon untuk mengenepikan award penimbangtara dan (ii) membenarkan saman pemula responden (PNE PCB Berhad) dan membenarkan penguatkuasaan award timbangtara. Faktanya adalah penimbangtara telah memberi award terhadap perayu. Award tersebut telah dibuat di bawah Kaedah-Kaedah Timbangtara Perdagangan Antarabangsa Suruhanjaya Bangsa-Bangsa Bersatu (KTPASB) dan Kaedah-Kaedah Pusat Timbangtara Serantau Kuala Lumpur (KPTSKL). Isu-isu yang timbul di sini adalah (i) sama ada Mahkamah Tinggi salah apabila memutuskan s. 34(1) Akta Timbangtara 1952 mengambil timbangtara di luar bidangkuasa mahkamah dan (ii) sama ada dalam pentafsiran sebenar s. 27 dan s. 34 Akta Timbangtara 1952, Mahkamah Tinggi adalah betul dalam membenarkan responden menguatkuasakan award.

Diputuskan (menolak kedua-dua rayuan)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 34(1) menyatakan niat jelas Parlimen yant tidak memberi bidangkuasa ke mahkamah kerana 'pihak-pihak telah terus ke timbangtara dengan pengetahuan penuh batasan mahkamah seperti yang disediakan di dalam s. 34(1).' Tidak terdapat terma nyata atau tersirat di dalam kontrak yang dimasuki oleh pihak-pihak yang terlibat yang boleh ditafsirkan sebagai menyatakan boleh mencari jalan penyelesaian di mahkamah. Pihak-pihak yang terlibat telah secara bebas dan dengan relanya memasuki kontrak dan mereka telah dengan nyata dan cermat memilih untuk mengecualikan campur tangan mahkamah. Mereka telah memilih untuk mematuhi KTPASB dan KPTSKL. Pemilihan itu mesti dilihat dari segi akibat-akibat yang mengalir dari s. 34(1).

(1a) Analisa penghakiman-penghakiman relevan telah dengan amat jelasnya menunjukkan bahawa selain dari 'keadaan kecemasan' atau situasi kemustahakan di dalam *Thye Hin Enterprises Sdn Bhd*, autoriti-autoriti kuat menunjukkan corak yang konsisten

di bawah s. 34(1) iaitu Akta atau undang-undang bertulis yang lain tidak boleh digunapakai ke atas timbangtara yang diputuskan di bawah, seperti di dalam rayuan ini, KTPASB dan KPTSKL. Prinsip pengecualian ini adalah utama dan mengatasi, terutama bilamana s. 34(1) bermula dengan perkataan-perkataan 'Walaupun bertentangan di dalam Akta atau undang-undang bertulis'. Pihak-pihak yang terlibat telah dengan sengaja dan dengan sepenuhnya bersetuju dan memilih penyelesaian pertikaian melalui timbangtara khas iaitu timbangtara di bawah KTPASB dan KPTSKL. Kebebasan memilih adalah nyata dan jelas. Niat pihak-pihak yang terlibat adalah dengan nyata untuk mengecualikan pertikaian dari bidangkuasa Mahkamah Tinggi.

(2) Seksyen 27 dengan jelas menyatakan untuk budibicara mahkamah membenarkan penguatkuasaan secara amnya award timbangtara yang diberi oleh Akta Timbangtara 1952, dan bukan di bawah KTPASB dan KPTSKL. Di dalam rayuan ini, penguatkuasaan award timbangtara yang dibuat di bawah KTPASB dan KPTSKL adalah khususnya tertakluk pada efek-efek kombinasi s. 34(1), (2) dan (3). Penguatkuasaan award tersebut adalah pengecualian kepada prinsip pengecualian am yang melepaskan permohonan peruntukan-peruntukan Akta dan undang-undang bertulis kepada timbangtara yang diputuskan di bawah KTPASB dan KPTSKL. Seksyen 34(1) dibaca dengan s. 34(2) membenarkan penguatkuasaan di bawah s. 34(2) di Malaysia award timbangtara yang dibuat di bawah s. 34(1). Di bawah s. 34(3), mahkamah yang mempunyai bidangkuasa kompeten untuk memberi kesan kepada penguatkuasaan adalah Mahkamah Tinggi.

Case(s) referred to:

Eternal Construction Sdn Bhd lwn. Kerjaya Balfour Beatty Cementation Sdn Bhd & Satu Lagi [2004] 2 CLJ 631 HC ***(refd)***

Jati Erat Sdn Bhd v. City Land Sdn Bhd [2002] 1 CLJ 346 HC ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Klockner Industries-Anlagen GmbH v. Kien Tat Sdn Bhd & Anor [1990] 1 LNS 70 HC ***(refd)***

Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(dist)***

Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd & Ors [1998] 3 CLJ 275 CA ***(refd)***

Soilchem Sdn Bhd v. Standard-Elektrik Lorenz AG [1992] 1 LNS 51 HC ***(refd)***

Thye Hin Enterprises Sdn Bhd v. Daimlerchrysler Malaysia Sdn Bhd [2004] 3 CLJ 591 CA ***(refd)***
Visage Engineering Sdn Bhd v. Smart Frame Sdn Bhd [2009] 1 LNS 779 HC ***(refd)***

Legislation referred to:
Arbitration Act 1952, ss. 24(2), 25(2), 27, 34(1), (2), (3)
Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985, s. 2(1)
Rules of the High Court 1980, O. 18 r. 19(1)(a)
UNCITRAL Arbitration Rules, art. 10(1), (2)

For the appellant - Mubashir Mansor; M/s Skrine
For the respondent - Liza Chan Sow Keng; M/s Liza Chan & Co

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R1-25-281-2007 & Originating Summons No: R1-24-79-2007]

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing JCA:

Appeals

[1] We find it useful to tabulate these two appeals, by Asia Control Systems IMPAC (M) Sdn Bhd ("the appellant"), against two decisions of the Kuala Lumpur High Court, as follows:

Appeal No.	Order Appeal Against
(1) W-02-1990-2009	Dismissal of the appellant's originating motion which sought to set aside the arbitrator's award.
(2) W-02-1982-2009	Allowed the respondent's (PNE PCB Berhad's) originating summons and granted leave to enforce the arbitrator's award.

Agreed Facts

[2] The parties have entered into a contract dated 14 May 1998 ("the contract"). Clause 8 thereof is the arbitration clause.

[3] The arbitrator handed down his award on 27 August 2007 ("the award") against the appellant.

[4] The award was made pursuant to the (United Nations Commission on International Trade Law) UNCITRAL Arbitration Rules and the Rules of the Kuala Lumpur Regional Centre for Arbitration ("KLRCA") (revised August 2001).

[5] The appellant's application *vide* originating motion dated 5 October 2007, based on art. 10(1) and (2) of the UNCITRAL Arbitration Rules and s. 24(2) of the Arbitration Act 1952, to set aside the arbitrator's award, was dismissed by the High Court. (A reference hereinafter to a section is a reference to that section in the Arbitration Act 1952, unless otherwise stated). The appellant's appeal against the decision of the High Court was registered as No. W-02-1990-2009.

[6] On the other hand, the respondent's application by way of originating summons for leave to enforce the award was allowed by the High Court. The appellant's appeal against that decision was registered as W-02-1982-2009.

Application To Set Aside The Award: Jurisdiction

[7] Appellant's learned counsel, Mr Mubashir bin Mansor, argued that the High Court erred in holding that s. 34(1) took the arbitration out of the jurisdiction of the Court. He elaborated, *inter alia*, that:

(a) Section 34(1) left the issue of jurisdiction to the UNCITRAL Arbitration Rules and the Rules of the KLRCA, and there was an express or implied term in the contract on recourse to the High Court, relying on *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503, 531 to 533 FC, and s. 24(2);

(b) The right to challenge the arbitrator under art. 10 of the UNCITRAL Arbitration Rules necessarily included the right to challenge the award. (A reference to an article hereinafter is a reference to that article in the UNCITRAL Arbitration Rules, unless otherwise stated);

(c) The arbitrator may be challenged on grounds of justifiable doubts on his impartiality or independence under art. 10(1), or for other reasons under art. 10(2); and

(d) The High Court failed to appreciate that the aforesaid grounds were not raised in the earlier authorities which considered s. 34(1) *viz*:

(i) *Klockner Industries-Anlagen GmbH v. Kien Tat Sdn Bhd & Anor* [1990] 1 LNS 70 HC;

(ii) *Soilchem Sdn Bhd v. Standard-Elektrik Lorenz AG* [1992] 1 LNS 51 HC;

(iii) *Jati Erat Sdn Bhd v. City Land Sdn Bhd* [2002] 1 CLJ 346 HC;

(iv) *Eternal Construction Sdn Bhd lwn. Kerjaya Balfour Beatty Cementation Sdn Bhd & Satu Lagi* [2004] 2 CLJ 631 HC;

(v) *Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd & Ors* [1998] 3 CLJ 275 CA;

(vi) *Thye Hin Enterprises Sdn Bhd v. Daimlerchrysler Malaysia Sdn Bhd* [2004] 3 CLJ 591 CA; and

(vi) *Visage Engineering Sdn Bhd v. Smart Frame Sdn Bhd* [2009] 1 LNS 779 HC.

[8] In reply, respondent's learned counsel, Ms Liza Chan Sow Keng, contended that the parties have elected to exclude their dispute from the jurisdiction of the court. She cited s. 34(1), 24(2), *Klockner Industries-Anlagen GmbH*, *supra*; *Soilchem Sdn Bhd, supra;* and *Sarawak Shell Bhd*, *supra*, in support thereof.

[9] The High Court took the view, *inter alia*, that s. 34(1) expresses the clear intention of Parliament not to give jurisdiction to the court as the "parties have proceeded to arbitration knowing full well the limitation of the court set out in s. 34(1)."

[10] In dealing with the appellant's contention that there was an express term of the agreement to provide for recourse to the High Court, we are constrained to note that, upon our perusal of the contract, we are unable to find any express term to provide for this recourse. We therefore reject this contention.

[11] In relation to the appellant's argument that there was an implied term in the contract, to permit recourse to the High Court, we respectfully refer to *Sababumi (Sandakan) Sdn Bhd*, *supra*, where the Federal Court, through the judgment of Peh Swee Chin FCJ (as he then was), propounded three types of implied terms *viz*:

(a) Terms which the court infers from evidence that the parties to a contract must have intended to include in the contract though not expressly set out therein;

(b) Terms that come about by operation of law; and

(c) Terms that are implied by reasonable custom and usage of any market or trade.

[12] For the first type of implied term, his Lordship set out two tests to be fulfilled *viz*:

(a) Subjective in nature, "something so obvious that it goes without saying, so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provisions for it in the agreement, they would testily suppress him with a common 'Oh, of course'; and

(b) The implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. Business efficacy means the desired result of the business in question.

[13] In the instant appeal, we are unable to imply any term into the contract entered into by the parties herein which is capable of being construed as giving rise to any recourse to the court.

[14] Quite apart from that, we also find that the Federal Court judgment in *Sababumi (Sandakan) Sdn Bhd*, *supra*, is not helpful to the appellant at all as it did not revolve around the issue of an arbitration clause and the implied term giving rise to a recourse to the High Court. The facts there concern betting and gaming licences and hence are readily distinguishable from those herein.

[15] Reverting to the instant appeal, it is our specific finding that the parties have freely and voluntarily entered into the contract. We are not at liberty and will not rewrite the contract for the parties who have expressly and carefully chosen to exclude Court intervention. They have elected to abide by the UNCITRAL Arbitration Rules and the Rules of the KLRCA. That election by them must be viewed in the light of the consequences flowing from s. 34(1).

[16] We are of the view that, except for the enforcement of an arbitral award with leave of the High Court, s. 34 excludes the application of the Act or other written law to any arbitration held under the UNCITRAL Arbitration Rule and the Rules of the KLRCA. Section 34(1) reads:

Act not to apply to certain arbitrations

34. (1) Notwithstanding anything to the contrary in this Act or in any other written law but subject to subsection (2) in so far as it relates to the enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration held under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur.

(2) Where an award made in an arbitration held in conformity with the Convention or the Rules specified in subsection (1) is sought to be enforced in Malaysia, the enforcement proceedings in respect thereof shall be taken in accordance with the provisions of the Convention specified in subsection (1) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, as may be appropriate.

(3) The competent court for the purpose of such enforcement shall be the High Court. (Added by Act A478/80).

[17] The legal implications of s. 34 had been extensively explored by our courts in a good number of judgments. We propose to embark on a detailed discussion in order to distill the principles therefrom.

(1) *Klockner Industries - Anlagen GmbH, supra*

The applicant and first respondent are parties to a contract relating to the installation of a pulp and paper mill in Sipitang, Sabah, Malaysia. A dispute arose between them. According to cl. 37 of the contract, the dispute has to be settled by arbitration in accordance with the Rules of the KLRCA. Pursuant to the clause, parties submitted their dispute to the KLRCA for arbitration. The arbitrators were duly appointed and the parties filed their pleadings. During the adjournment of the arbitration proceedings pending in the KLRCA, the applicant filed an application in the High Court for an order, inter alia, that the applicant be at liberty to continue the counterclaim against the first respondent. The High Court has to consider whether it has the power to make an order as prayed in the application. Zakaria Yatim J (later FCJ) dismissed the application and held that:

A (a) It is clear that under cl. 37, the court cannot exercise its supervisory function as provided in the Arbitration Act 1952, in respect of such arbitration. Neither can the court exercise its supervisory function over such arbitration under any written law.

B (b) By virtue of s. 34, the arbitral tribunal has to decide the issues raised before it and the court cannot and will not interfere with the proceedings of the tribunal.

C (c) The court has no jurisdiction to make the order sought by the applicant.

(2) *Soilchem Sdn Bhd, supra*

D An arbitration agreement between Soilchem Sdn Bhd ('the applicant') and Standard-Elektrik Lorenz AG ('the respondent') provided for disputes to be settled by arbitration under the Rules of the KLRCA. An award was made under the KLRCA on 10 February 1990 and two supplementary awards as to costs were made on 30 March 1990 and 11 January 1991. The E applicant then commenced an originating motion to challenge the arbitrator's awards by way of *certiorari*. On 24 July 1991, the respondent applied for, *inter alia*, an order that the applicant's originating motion be struck out. Abu Mansor J (later FCJ) ordered that the applicant's originating motion be F struck out, as the policy of s. 34(1) was obviously to exclude cases that are before the KLRCA from intervention by the court. Section 34(1) was meant to and does exclude the jurisdiction of the court, such as the jurisdiction to quash by way of *certiorari*.

G (3) *Jati Erat Sdn Bhd, supra*

(a) While arbitration proceedings between the plaintiff and defendant were afoot at the KLRCA, the plaintiff applied by way of originating summons in the High Court for a H Mareva injunction to restrain the defendant from dissipating certain assets, until one month after the arbitration proceedings were resolved.

(b) On the issue of jurisdiction, I held in the High Court that I the arbitration proceedings came within the ambit of the clear and precise provisions of s. 34(1) which excluded the application of the Act or other written law to the arbitration proceedings.

(c) In any event, I also proceeded to consider the merits of the plaintiff's application for Mareva injunction. Having examined the essential elements which the plaintiff has to establish in order to obtain the Mareva injunction, I concluded that the plaintiff has failed to discharge the burden of proof for this purpose. Hence, the plaintiff's originating summons was dismissed with costs.

(d) After delivering my grounds of judgment, I am unaware if the plaintiff had pursued the matter further in the Court of Appeal or the Federal Court.

(4) *Eternal Construction Sdn Bhd, supra*

(a) The parties had entered into a construction contract which contains an arbitration clause, to refer their dispute to arbitration under the Rules of the KLRCA. Their dispute had been referred to arbitration and the arbitration proceedings were still pending.

(b) The plaintiff *vide* originating summons in the High Court sought several reliefs including an injunction.

(c) The first defendant applied by way of summons in chambers under O. 18 r. 19(1)(a) to set aside the plaintiff's originating summons.

(d) In allowing the first defendant's application and striking out the plaintiff's originating summons, Sulaiman Daud J (now JCA) held, *inter alia*, that s. 34 applied to exclude the jurisdiction of the High Court.

(5) *Sarawak Shell Bhd, supra*

This was an appeal against the decision of the High Court judge who held that s. 34(1) prohibited any reference to s. 25(2). The parties had entered into a contract whereby all disputes were to be conducted by arbitrators under the relevant Arbitration Rules ('the Rules') and not the court. On 15 March 1996, the respondents had written to the appellant concerning the valuation of the contract in which they accused the appellant of conspiring with their subcontractors to take over works awarded to the joint venture. The appellant denied the allegations claiming such remarks were defamatory and insisted the remarks be withdrawn. The respondents persisted and, in their letter of 14 May 1996, stated that if the appellant insisted

on maintaining their stand, the respondents would pursue the point in arbitration. On 24 May 1996, the respondents served a written notice with points of claim on the appellant in accordance with the Rules and thereafter appointed an arbitrator. The Director of the Regional Centre for Arbitration ('the Director') was informed and the initial payment was duly made. On 25 June 1996, the Director informed the appellant that the appointment of their arbitrator was due. By that stage the arbitration had commenced. The appellant sought to stymie the arbitration proceedings commenced by the respondents by filing an originating summons on 26 June 1996 praying that the court exercise its powers under s. 25(2) which empowers the High Court to revoke the authority of an arbitrator or to restrain arbitration proceedings where the arbitrator is not impartial or where fraud is involved. The originating summons was later amended to include a claim that the court also had jurisdiction at common law or an inherent jurisdiction to make the orders sought. In delivering the judgment of the Court, and dismissing the appeal, Mahadev Shankar JCA (as he then was) held that the effect of s. 34(1) was to exclude altogether not just s. 25(2) but the entire Act and all other written laws from an arbitration held under the Rules.

(6) *Thye Hin Enterprises Sdn Bhd, supra*

(a) This was an appeal from the decision of the High Court in upholding the defendant's preliminary objection and dismissing the plaintiff's application for an interim injunction to maintain the *status quo* of the parties pending the resolution (by arbitration) of the contractual dispute between the plaintiff and the defendant.

(b) The High Court did not take the plaintiff's application through the principles enunciated in *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors* [1995] 1 CLJ 293 CA.

(c) The facts revealed that pursuant to a dealership agreement entered into earlier, the defendant (distributor) had appointed the plaintiff as a dealer for its Mercedes Benz vehicles in the states of Perlis and Kedah. The agreement had provided that any dispute between them shall be referred to arbitration at the KLRCA.

(d) The central issue that arose for decision before the Court of Appeal was whether the grant of the injunction was proscribed by s. 34. Mohd Ghazali Yusoff JCA (now FCJ) delivering the judgment of the Court (including Nik Hashim JCA (later FCJ) and me) held that s. 34 "only excludes interference with the arbitration itself" and "has no application to cases where interim relief is urgently required". Consequently, "the grant of interim relief pending the outcome of an arbitration held at the KLRCA is not prohibited by s. 34. The decision of the High Court in upholding the defendant's preliminary objection was set aside and the plaintiff's application was remitted to the High Court to be heard on merits, which approach is indeed consistent with that adopted by me in the second part of my judgment in *Jati Erat*, *supra*.

(e) The Court of Appeal in *Thye Hin Enterprises Sdn Bhd*, *supra*, was entirely in agreement with the views of the learned author Sundra Rajoo in the article entitled "Issues Related to Arbitrations Conducted Under the KLRCA Rules" [2002] 2 MLJ xlix that while the decision in *Jati Erat*, *supra*, is correct on the plain reading of s. 34, it would seem that the KLRCA rules recognize the need for court intervention in certain situations, particularly in emergency cases. The court further stressed that "the grant of interim relief pending the outcome of an arbitration held at the KLRCA is not prohibited by s. 34."

(f) Reverting to the instant appeal, it is abundantly clear to us that the ratio in *Thye Hin Enterprises Sdn Bhd*, *supra*, relates to the grant of interim relief in emergency cases or in a state of urgency, but does not extend to cover the instant appeal, which sought to set aside an award which had already been handed down. The question of an emergency case or a state of urgency is completely non-existent in the instant appeal. In the circumstances, we hereby hold that the judgment in *Thye Hin Enterprises Sdn Bhd*, *supra*, is not supportive of the appellant's submission.

(7) *Visage Engineering Sdn Bhd*, *supra*

The respondent was the claimant in the arbitration proceedings relating to a construction claim. The arbitrator was appointed by consent of the parties by the Director of the KLRCA. The arbitrator after hearing the parties had published the final award.

A The applicant filed an originating motion seeking *inter alia* to set aside the award. Hamid Sultan JC (now J) held that s. 34 applies and the court cannot intervene.

[18] Our analysis of the relevant judgments above makes it crystal B clear to us that apart from "the emergency situation" or a state of urgency in *Thye Hin Enterprises Sdn Bhd*, *supra*, the preponderance of authorities reveals a consistent pattern under s. 34(1) ie, the Act or other written law shall not apply to any arbitration held under, as in the instant appeal, the UNCITRAL Arbitration Rules and the C Rules of the KLRCA. This exclusionary principle is predominant and prevails, particularly where s. 34(1) begins with the words "Notwithstanding anything contrary in this Act or any other written law." The parties herein have consciously and decisively agreed and chosen the special alternative dispute resolution ie, arbitration under D the UNCITRAL Arbitration Rules and the Rules of the KLRCA. This freedom of choice exercised by the parties is clear and unambiguous. The intention of the parties is to expressly exclude the dispute from the jurisdiction of the High Court. This intention is further manifested in cl. 8, in the following words:

E

> All claims and disputes between "IMPAC" and PNE PCB Bhd, including matters arising out of or relating to this Agreement, shall be resolved by formal arbitration. The rules and procedures of the Regional Centre for Arbitration Kuala Lumpur shall apply unless the parties mutually agree otherwise.

F

[19] The parties herein have not mutually agreed otherwise.

Enforcement Of Award

[20] Finally, in resisting the leave granted by the High Court to G enforce the arbitrator's award, the appellant argued that there was a contradiction in terms in the High Court's grounds of decision in having accepted the appellant's contention that the award was not a "Convention award" within the meaning of s. 2(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral H Awards Act 1985 ("the 1985 Act"), and yet had granted leave to enforce the award pursuant to the respondent's originating summons.

[21] In reply, the respondent relied on s. 27 and s. 34(2) in I support of the contention that the High Court had correctly granted leave to enforce the award.

[22] The High Court had sustained the respondent's contention.

[23] The question which we must address is:

> Upon the true construction of s. 27 and s. 34, was the High Court correct in granting leave to the respondent herein to enforce the award?

[24] Section 27 expressly provides for the discretion of the High Court to grant leave for the enforcement generally of an arbitral award handed down under the Arbitration Act 1952, and not pursuant to the UNCITRAL Arbitration Rules and the Rules of the KLRCA. It reads:

> Enforcement of award
>
> 27. An award on an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect, and, where leave is so given, judgment may be entered in terms of the award.

[25] In the instant appeal, the enforcement of an arbitral award made pursuant to the UNCITRAL Arbitration Rules and the Rules of the KLRCA is more specifically governed by the combined effect of s. 34(1), (2) and (3), reproduced *in extenso* above. The enforcement of such an award is indeed an exception to the general exclusionary principle which dispenses with the application of the provisions of the Act or other written law to an arbitration held under the UNCITRAL Arbitration Rules and the Rules of the KLRCA. Section 34(1) read with s. 34(2) permits the enforcement under s. 34(2) in Malaysia of an arbitral award made under s. 34(1). Pursuant to s. 34(3), the court of competent jurisdiction to effect the enforcement is the High Court.

[26] In the circumstances, we have no difficulty in answering the above question in the affirmative.

Conclusion

[27] On the grounds given above, we dismissed both these appeals with costs of RM5,000, in each appeal, to the respondent. The deposit is to be paid to the respondent on account of the fixed costs.